IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL SIDE JURISDICTION

Writ Petition No.2006 of 200l

l. Dimondstar Exports Ltd
804 Panchratna Opera house
Mumbai 400004
2. Sudhir Chhotalal Shah
Sital Baug,Sital Bhavan
Third floor, Walkeshwar
Mumbai 400006
3. Dharmesh Raisurana
Sales Manager,Jewellery
Division,Sales Office
Dimondstar Exports Limited
804/807A Panchratna
Opera House, Mumbai 400006 ..Petitioners

vs

l. The Director General of
Income Tax (Investigation)
North Aayakar Bhavan
5 Ashok Marg, Lucknow
2. The Director of Income Tax
(Investigation) Aayakar Bhavan
6/69 Civil Line Kanpur.
3. The Director General of
Income Tax (Investigation)
Aayakar Bhavan, M K Road
Mumbai 400020
4. The Director of Income Tax
(Investigation) Aayakar Bhavan
M K Road, Mumbai 400020
5. The Deputy Commissioner of
Income Tax (Investigation)
Circle 3(l) Aayakar Bhavan
5th floor, M K Road
Mumbai.20
6. The Deputy Commissioner of
Income Tax (Investigation)
Circle II(l),Smt K G Mittal
Ayurvedic Hospital Bldg,
Charni Road, Mumbai 2
7. The Central Board of Direct
Taxes, Ministry of Finance
North Block New Delhi ll000l
8. Union of India. ..Respondents

Mr.B.V.Jhaveri with Mr A.R.Singh for petitioners
Mr. R.Ashokan for respondents

CORAM: A.P.SHAH & S.C DHARMADHIKARI JJ.
Dated 3.l2.2004

Per A.P.Shah J.

l. The lst petitioner is a company incorporated under the Companies Act and is engaged in the business of manufature, purchase and sale of gold, diamonds, ornaments and jewellery and 2nd and 3rd petitioners are respectively Director and Sales Manager of the lst petitioner. The petitioners have approached this court for quashing the warrant of authorisation issued under section l32 of the Income Tax Act and follow up action including search and seizure of gold,diamonds, ornaments and jewellery and consequent notices issued under section l58BC of the Income Tax Act.

2. Accoring to the petitioners the lst petitioner with a view to explore local and foreign markets, regularly participates in various jewellery exhibitions held in India and abroad. One such jewellery exhibition called "Swarna Sambandh" was organised by M/s Sercon India Pvt Ltd, New Delhi to be held at Taj Hotel, Lucknow for three days from l3.l.200l to l5.l.200l, for which the lst petitioner sent its three employees i.e.

Mr.Parimal Patel, Mr.Manish Jhaveri and petitioner no. 3 to Lucknow. Mr. Patel and Mr.Jhaveri went to Lucknow by train and they reached there on l2.l.200l, the petitioner no.3 proceeded to leave Mumbai on l2.l.200l to Lucknow by Flight No S2907 of Sahara Air Lines which was to depart from Santacruz Airport at 4.p.m. He was carrying with him gold, diamonds,jewellery and ornaments having an estimated sale value of Rs.84.68 lacs. It appears that the petitioner no.3 was intercepted at the Airport at Mumbai when he was about to board the flight to Lucknow by the officers of the Income Tax Investigation Department,Mumbai. It is the case of the petitioners that the petitioner no. 3 answered all the queries and produced various documents in his possession like invitation from M/s Sercon India Pvt Ltd,introductory letter from Bank of India Mumbai to its branch in Lucknow for opening of account for depositing the sale proceeds of the exhibition and Income tax, Sales tax and Gem and Jewellery Membership Certificates. The concerned officer stationed at the Airport at Mumbai took declaration of the petitioner no.3 and allowed him to proceed to Lucknow. It appears that on the basis of a fax message received from the Investigation Department, Mumbai the respondent

no.l issued an authorisation under section l32 of the Act and on arrival at Lucknow officers of Investigation Department at Lucknow went to the aircraft and served search warrant on the petitioner no. 3. The petitioner no. 3 was interrogated by the officers and once again, he explained and showed all the above referred records and documents,however, the officers seized the diamonds, gold and jewellry etc. Two other employees who had reached Lucknow were also interrogated. It is further case of the petitioners that subsequent to search and seizure action carried on at Lucknow, the lst petitioner as also its associate concern and its directors were subjected to search from l2.l.200l to 20.l.200l. During the said search, jewellery and ornaments in the business premises were kept under prohibitory order and after due verification of the stock books, documentary records, challans and stock sent to Lucknow for exhibition and after having been satisfied regarding the records,source and valuation, the said stock was released to the petitioner no.l on 20.l.200l. There has been no seizure from any of the busienss premises of petitioner no.l and its associate concern or from residences of its directors. Thereafter the

petitioners addressed several letters to the respondents contending inter alia that the search and seizure was illegal and requesting immediate release of gold, diamonds, ornaments and jewellery but the letters failed to evoke any response from the respondents. In the meanwhile the respondents proceeded to issue notices to the petitioners under section l58BC of the Income Tax Act.

3. The action of the respondent no. l in issuing authorisation under section l32 of the Income Tax Act and follow up action of search and seizure is challenged mainly on the ground that there was no information on record, on the basis whereof the respondent no.l could form belief that the said gold, diamonds,jewellery etc. recovered from the petitinoer no. 3 represented wholly or partly the income which had not been or would not have been disclosed for the purpose ofthe Act, a condition precedent for exercise of powers under section l32(l) of the Act. The contention is that since the authorisation itself was illegal and void ab initio, all proceedings taken consequent thereto are also rendered illegal and void.

4. In the affidavit in reply filed on behalf of

the respondent nos.l and 2, a preliminary objection has been raised as to maintainability of the petition on the ground that the petition is premature and the petitioners have got efficacious alternate remedy of raising these contentions in proceedings under section l58BC of the Act. On merits it is stated that the authorisation was given on the basis of the fax communication from the Investigating Unit , Mumbai and there is no illegality or infirmity in the action of warrant and seizure.

5. Mr. Jhaveri, learned counsel appearing for the petitioners submitted that mere intimation by the Investigating Unit that the petitioner no. 3 was possessing gold, diamonds,and jewellery etc. could not constitute information within the meaning of section l32 of the Act particularly when the sales representative of the lst petitioner from whom gold, diamonds, juewellery etc. was seized had shown documentary proof that the same was part of the stock in trade of the petitioner no.l, a regular assessee in Mumbai and it was being taken to Lucknow for participation in the exhibition. The learned counsel urged that there could be no reason for the respondent no.l to form a belief

that the petitioner no.3 was in possession of gold, diamonds, jewellery etc. which represented undiscloed income,wholly or partly. Therefore the learned counsel submitted that none of the ingredients of section l32(l)(c) of the Act was made out and, therefore, the entire action search and seizure was illegal. On the other hand, it was contended by Mr.Ashokan, that the information supplied by the Investigating Unit at Mumbai constituted foundation for the belief that the jewellery and ornaments in question represented undisclosed income and in any case according to him this is not a fit case for entertaining under Art 226 and the petitioners should be directed to agitate all these contentions in proceedings under section l58BC of the Act.

6. Section l32 of the Act clothes the Director General or Chief Commissioner and some other officers,in the circumstances mentioned therein, with the power to authorise entry into and search of any building, place etc and seizure of any books of account, documents, money, etc found therein, and prescribes the procedure to be adopted consequent upon such seizure or acquisition. The relevant portion of these provisions which concern

us for the disposal of writ petition are these:

> 32(l) Where the Director General or Director or the Chief Commissioner or Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board in consequence of information in his possession, has reason to believe that-
>
> (a).....
> (b).....
>
> (c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represent either wholly or partly income or property which has not been or would not be disclosed for the purpose of the Indian Income Tax Act, l922(II of l922) or this Act hereinafter in this section referred o as the undisclosed income or property.

then-

(A) the Director General or Director or the Chief Commissioner or Commissioner as the case may be, may authorize any Joint Director Joint Commissioner Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer or

(B)such Joint Director or (Joint Commissioner as the case may be, may authorize any Assistant Director or Deputy Director ,Assistant Commissioner or Deputy Commissioner, or Income tax Officer.

the officer so authorized in all cases being hereinafter referred to as the authorized officer to-

(i) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money,bullion, jewellery or other valuable article or thing are kept......."

7. It is well settled that the existence or otherwise of the condition precedent to exercise of power under these provisions is open to judicial scrutiny. The absence of the condition precedent would naturally have the effect of vitiating the authorisation made under section l32 and the proceedings consequent thereto. While the sufficiency or otherwise of the information cannot be examined by the court, the existence of information and its relevance to the formation of the belief can undoubtedly be gone into. Also, whether on the material available with the Director/ Commissioner, any reasonable person could have arrived at the conclusion that a search, seizure, requisition should be authorised is a field open to judicial review. In Dr.Nandlal Tahiliani vs. CIT (l988) l70 ITR 592, R.M.Sahai J., (as his Lordship then was) observed:

> "Search and seizure are a common feature of fiscal statutes. Its utility cannot be undermined in a civilized society. But it is capable of being abused as well. That is why the legislation always provides inbuilt safeguards. For instance, the condition precedent for action under section l32 is

the information in the possession of the authority in consequence of which he may have reason to believe that any person was in possession of any money, bullion or jewellery or other valuable articles which represented undisclosed income. How each of them should be understood and what they mean has been explained by courts from time to time. If either of these conditions is missing or have not been adhered to,then the authority is precluded from invoking the powers under this section (see Ganga Prasad Mahashwari v CIT (l983) l39 ITR l043(All). Information in consequence of which the Director or the Commissioner has reason to believe is the foundation for action.It sets the machinery in motion.Therefore, it has not only to be authentic but capable of giving rise to the inference that the person was in possession of undisclosed income which has not been or would not be disclosed. Reason to believe has been explained in many decisions both under sections l32 and l48 of the Income tax Act(see Chhugamal Rajpal v S.P.Chaliha (l97l) 79 ITR 603, (SC), ITO v Lakhmani

Mewal Das (l976) l03 ITR 437 (SC), Ganga Prasad Maheshwari v CIT (l98l) l39 ITR l043, (All) and Vindhya Metal Corporation v CIT (l985) l56 ITR 233 (All). In order that the formation of opinion must be in good faith and not a mere pretence, it is necessary that the information in consequence of which it is formed must be valid and linked with the ingredients mentioned in the section. That is, there must be rational connection between the information or material and the belief about undisclosed income...".

"...Satisfaction of the authorities may be subjective,but it must be arrived at objectively on materials. Not one could be found on record. The expression is "reason to believe that the income has not been disclosed and not probably it may not have been disclosed". It is not left to guessing. It carries with it the impress of certainty.... Reasonable belief exists if the information is not only trustworthy but reasonable and sufficient in itself or warrant the conclusion that the provisions of section l32 were being violated. Because

> if the exercise of power is bad or unlawful in inception, then it is not validated or nor does it change character from its success. It would not, therefore, be asking too much from the authorities to comply with the basic requirements of the section before they are permitted to invade the secrecy of one’s home".

8. The Special Leave Petition filed against this judgment was dismissed by the Supreme Court (see CIT vs Dr Nandlal Tahiliani- (l988) l7l ITR (SC) 47.

9. In L. R Gupta vs Union of India,(l992) l94 ITR 32,it was held by the Delhi High Court that the expression "information" must be something more than a mere rumour or a gossip or a hunch. There must be some material which can be regarded as information which must exist on the file on the basis of which the authorizing officer can have reason to believe that action under section l32 is called for any of the reasons mentioned in clauses (a), (b),or (c). When the action of issuance of an authorization under section l32 is challenged in a

court, it will be open to the petitioner to contend that, on the facts or information disclosed, no reasonable person could have come to the conclusion that action under section l32 was called for. B N Kripal J. (as His Lordship then was) explained the scope of the expression "information" as under:

> "The expression "information" must be something more than a mere rumour or a gossip of a hunch. There must be some material which can be regarded as information which must exist on the file on the basis of which the authorizing officer can have reason to believe that action under section l32 is called for any of the reasons mentioned in clauses (a), (b),or (c). When the action of issuance of an authorization under section l32 is challenged is a court, it will be open to the petitioner to contend that, on the facts or information disclosed, no reasonable person could have come to the conclusion that action under section l32 was called for. The opinion which has to be formed is subjective and, therefore, the jurisdiction of the court to interfere is very limited. A court will not act as an

> appellate authority and examine meticulously the information in order to decide for itself as to whether action under section l32 is called for. But the court would be acting within its jurisdiction in seeing whether the act of issuance of an authorization under section l32 is arbitrary or mala fide or whether the satisfaction which is recoded is such which shows lack of application of mind of the appropriate authority. The reason to believe must be tangible in law and if the information or the reason has no nexus with the belief or there is no material or tangible information for the formation of the belief,then, in such a case, action taken under section l32 would be regarded as bad in law".

l0. In Ajit Jain vs. Union of India, (2000) 242 ITR 302,the Division Bench of Delhi High Court has held as follows:

> "Thus,for authorizing action under section l32, the conditions precedent are:(i) the information in the possession of the named authority; and(ii) consequence of which he

> may have reason to believe that the person concerned is in possession of money, bullion, etc, which represents,either wholly or partly, income which has not been or would not be disclosed for the purpose of the Act. If either or these conditions are missing or have not been adhered to, then power under section l32 cannot be invoked.Thus, the basis of exercise of power under section l32(l) has to be formation of belief and the belief has to be formed on the basis of receipt of information by the authorizing officer that the person is in possession of money, etc, which represents undisclosed income".

ll. In CIT vs Vindhya Metal Corporation, (l997) 242 ITR 6l4 (page 6l8),a resident of Mirzapur was detained while travelling to Calcutta by train, and cash of Rs.4.63 lac was seized from him by the police on the suspicion that the money was stolen property or had been obtained through some other offence. The Commissioner issued a warrant of authorization under section l32A(l) of the Income tax Act. A search was conducted under section l32 of the Act on the premises of the respondent firm.

The respondent firm filed a writ petition questioning the validity of the warrant of authorization issued by the Commissioner under section l32A(l) of the Act. The High Court held that on the information in the possession of the Commissioner, no reasonable person could have entertained a belief that the amount in his possession represented undisclosed income. Upholding the judgment of the High Court the Supreme Court observed as under:

> " Mere unexplained possession of the amount, without anything more, could hardly be said to constitute information which could be treated as sufficient by a reasonable person, leading to a inference that it was income which would not have been disclosed by the person in possession for purpose of the Acts".
>
> (emphasis supplied)

l2. It is in the light of the above principles of law we proceed to examine the question whether fax message sent by the Investigation Officer at Mumbai constitutes "information" and could be said to be relevant for formation of the belief that the gold,

diamonds, jewellery etc/ found in possession of the petitioner no.3 had not been or would not be disclosed for the purpose of the Act. We called for the original papers containing reasons recorded and the order passed by the respondent no.l authorizing search of the Sales Manager of the petitioner no.l in the aircraft. Mr Ashokan placed on record copies of the relevant papers and we are constrained to observe that this material can hardly be said to be relevant material for the purpose of invoking powers under section l32 of the Act.It seems to be admitted position that the sole basis of the order of authorization is confidential fax message sent by the Additional Director of Income tax (Inv) Unit IX Mumbai to the Additional Director of Income tax (Inv) Lucknow. This fax message reads as follows:

"CONFIDENTIAL FAX MESSAGE

Office of the Addl Director of Income tax (Inv),Unit IX Mahalaxmi Chambers, Mumbai dated l2.l.200l

To

Mr U K Shukla

The Addl Director of Income tax (Inv)

Lucknow

Sir,

Sub:Intimation regarding passenger Shri Dharmesh Surana carrying jewellery items

Kindly refer to telephonic message given by the undersigned at 4.l5 p.m today regarding the above mentioned passenger Shri Dharmesh Shrama is travelling to Lucknow by Sahara Airlines flight no.S27907 whose scheduled departure time from Mumbai is 4.05 pm today i.e. l2.l.200l. He has stated that he is carrying jewellery items worth Rs.69 lacs. This is for your information and necessary action please.

Yours faithfully

sd/- A A Shankar l2.l.0l

Addl Director of Income tax(Inv)

Unit IX Mumbai

Copy for information to
Shri A K Gautam Addl DIT(Inv)
(HQ)Aayakar Bhavan Mumbai with
reference to directions of Ld DGIT Inv
Mumbai vide meeting dated l0.l.200l.

sd/ A A Shankar l2.l.0l

Addl Director of Income tax(Inv)

Unit IX Mumbai

l3. We have no hesitation in holding that on the basis of this fax message, without anything more, respondent no.l as a reasonable person, could not entertain a belief that the said gold, diamonds and jewellery etc in possession of the Sales Manager of the petitioner no.l represented income which had not been or would not be disclosed by the company for the purpose of the Act. The fax sent by the Addl Director of Income tax, Mumbai was general in nature. Mere fact that the petitioner no.3 was in possession of gold, diamonds and jewellery etc. would not lead to the inference that it was undisclosed income. There was nothing before the respondents to suggest that in fact the gold, diamonds, and jewellery etc.represents wholly or in part undisclosed income for the purposes of the Act. The fact that the petitioner no.3 was in possession of jewellery ornaments etc. could not be treated as appear to have been done by respondent no.l as information relatable to the conclusion that it represented income which would not have been disclosed for the purposes of the

Act. There is no doubt, in our mind, that on the information in possession of respondent no.l, no reasonable man could have entertained a belief that the gold, diamonds and jewellery etc in possession of the petitioner no. 3 represented income which would not have been disclosed for the purposes of the Act. Thus, the condition precedent for the exercise of power under section l32 was lacking in the present case and the authorisation granted by the respondent no.l was without jurisdiction.

l4. It has also come on record that before the Income Tax authorities at Mumbai as well as Lucknow in answer to the questions about the source of gold, diamonds and jewellery etc. the petitioner no.3 stated that this was part of the stock in trade of the company and was brought to Lucknow for the purpose of exhibition at "Swarna Sambhandh". It is also seen from the record that the petitioner no. 3 produced relevant documents before the concerned officer in order to show that the goods have been brought to Lucknow with sole intention of displaying the same in the exhibition and requested the authorities not to seize the goods. In the fax message there was not a whisper about the documents produced by the petitioner no. 3. Mere intimation

that a person is in possession of certain jewellery or ornaments cannot be construed to be sufficient for the purpose of action under section l32 of the Act for it would amount to giving untrammeled and unrestricted power on the authorities to search against any person and such power is likely to be abused.

l5. In view of the foregoing discussion, the impugned action under section l32 of the Income tax Act and further action in consequent thereto including notices under section l58BC are liable to be quashed and set aside. The seizure of the gold, diamonds and jewellery etc.on l2.l.200l was not valid and legal search and as a necessary corollary the provisions relating to block assessment have no application. The illegal search and seizure and all consequent actions are accordingly quashed and set aside. The respondents are directed to forthwith return the gold, diamonds, jewellery and ornaments seized from the petitioner no 3 with interest at the rate of 8% p.a. on the value of the jewellery and ornaments i.e. Rs.84.68 lacs from the date of seizure till payment. Rule is made absolute accordingly.

The learned counsel for the respondents seeks stay of this order for a period of l2 weeks. However we stay this order for a period of six weeks.